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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>BRIDGETTE LEE MONTOWINE,<br>Defendant and Appellant. | E069822<br>(Super.Ct.No. BAF1700709)<br>OPINION |

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed in part; reversed in part with directions.

Kevin J. Lindsley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski, Christen Somerville and Michelle Ryle, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Bridgette Lee Montowine of possession of methamphetamine while armed with a loaded firearm (Health & Saf. Code, § 11370.1,

count 1) sale of methamphetamine (Health & Saf. Code, § 11379, subd. (a), count 2), being a felon in possession of a firearm (Pen. Code,[1] § 29800, subd. (a), count 3), and being a felon in possession of ammunition (Pen. Code, § 30305, subd. (a), count 4). A trial court sentenced her to the upper term of four years on count 1, the middle term of three years on count 2, the middle term of three years on count 3, and the middle term of two years on count 4. The court stayed the term on count 2 pursuant to Penal Code section 654 and ordered the terms on counts 3 and 4 to run concurrent to the term on count 1.

On appeal, defendant contends that: (1) there was insufficient evidence to support the convictions on counts 1, 3, and 4; and (2) the court should have stayed the sentences on counts 3 and 4, pursuant to section 654. We agree that the evidence was insufficient to support the convictions on counts 1, 3, and 4, and we reverse the convictions on those counts. As such, a discussion on the applicability of section 654 is unnecessary. In all other respects, the judgment is affirmed.

## FACTUAL BACKGROUND

In May 2017, Erik Smith, a convicted felon, reached out to Officer Benjamin to tell him he would be willing to work as a confidential informant. Officer Benjamin agreed, so Smith gave him information on defendant. He had met her two weeks prior, and she told him she had access to firearms and drugs. They exchanged phone numbers, and he began speaking with her on the phone and texting her. Smith indicated that he

[1] All further statutory references will be to the Penal Code, unless otherwise noted.

was interested in buying some firearms. Defendant texted him pictures of two revolvers and said she "got them down to 3," which was street slang that she would be able to get them for him for $300. Defendant texted that "[the seller] needs the money right now for something," and asked if that was a problem. She told Smith the price would increase to $350 the next day. He texted back that he was willing to pay $50 more and said he would spend $1,000 the next day on handguns and some heroin.[2] Smith then asked for her address, so he could meet up with her and see where she lived. He met her at the trailer park where she lived and confirmed they would meet the following day for the sale of the firearms and drugs. Smith sent the photos of all the text messages from defendant to the police.

The next day, Smith met with the police to discuss how they wanted him to buy the drugs and firearms from defendant. They put a wire tap on him and a tracking device on his car.

Defendant texted Smith to tell him to meet her at a restaurant. He drove there and met her and two other males. They talked for a minute and defendant got into Smith's car to drive to the place where they were going to pick up the firearms and drugs. The two other men left in their own cars. Defendant directed Smith to a nearby trailer park. At the trailer park, defendant introduced Smith to a man called Slow Bro. Smith and Slow Bro went inside Slow Bro's trailer, and defendant waited outside. Inside the trailer, Smith saw at least three assault rifles, revolvers, and another handgun. He purchased two

[2] Smith actually used the word "black," which is slang for heroin.

revolvers that were loaded and a box of ammunition, plus two ounces of methamphetamine. The firearms were purchased for a total of $550, and the methamphetamine was purchased for $400.[3]

Smith exited the trailer and saw defendant leaning up against Slow Bro's truck, waiting for him to come out. Smith put the firearms and drugs in his trunk and said he was going home. Later, defendant called Smith to ask when she was going to "get [her] cut" since she "middle-manned" the deal. She wanted her money and said $60 would be fair. Smith drove to her trailer park to pay her.

The police subsequently showed Smith a photograph of a man named Jonathan H., and Smith identified him as Slow Bro.

## ANALYSIS

### I. There Was Insufficient Evidence to Support the Convictions on Counts 1, 3, and 4

During closing arguments, the prosecution argued that although Slow Bro was the actual perpetrator of the crimes in counts 1 through 4, defendant was guilty since she constructively possessed the methamphetamine and the firearms and/or she aided and abetted Slow Bro in possessing the methamphetamine, firearms, and ammunition and in selling the methamphetamine. On appeal, defendant argues the convictions in counts 1, 3, and 4 should be reversed, since there was insufficient evidence that she constructively possessed the methamphetamine, firearms, and ammunition, or that she aided and abetted Slow Bro's possession of the firearms or ammunition. We agree.

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[3] The police supplied Smith with the money to make the purchases.

A. *Standard of Review*

The appellate court must determine if the record discloses evidence that is reasonable, credible, and of solid value to support the judgment, such that a reasonable jury could have found the defendant guilty beyond a reasonable doubt. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) " 'First, we must resolve the issue in the light of the *whole record*—i.e., the entire picture of the defendant put before the jury—and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements . . . is *substantial*; it is not enough for the respondent simply to point to "some" evidence supporting the finding, for "Not every surface conflict of evidence remains substantial in the light of other facts." ' " (*People v. Johnson* (1980) 26 Cal.3d 557, 577.)

B. *The Evidence Was Insufficient to Support the Conviction in Count 1*

Defendant was convicted of possession of methamphetamine while armed with a loaded firearm (Health & Saf. Code, § 11370.1) in count 1. The record shows the prosecution's case was not based on the theory that defendant was guilty because she had actual possession of the methamphetamine, but that she aided and abetted Slow Bro in his commission of the crime.

The jury was instructed that to find defendant guilty of count 1, it had to find that she possessed methamphetamine, knew of its presence and nature or character, the methamphetamine was in a usable amount, and, while possessing it, she knowingly had a loaded, operable firearm available for immediate use. The jury was further instructed that to prove defendant guilty of a crime based on aiding and abetting, the People had to

prove that: (1) the perpetrator committed the crime; (2) defendant knew that the perpetrator intended to commit the crime; (3) defendant intended to aid and abet the perpetrator in committing the crime, before or during the commission of it; and (4) defendant's words or conduct did in fact aid and abet the commission of the crime. (CALCRIM No. 401.)

Here, the undisputed evidence showed that Slow Bro possessed methamphetamine in a usable amount, had a loaded firearm available for immediate use, and sold methamphetamine to Smith. Thus, there was sufficient evidence that Slow Bro was the perpetrator of the crime. However, there was no evidence that defendant intended to, or did in fact, aid and abet the commission of the crime. The crime in count 1 was possession of methamphetamine while armed with a loaded firearm. (Health & Saf. Code, § 11370.1.) There was no evidence presented that defendant aided Slow Bro's possession of the methamphetamine (e.g., she gave the methamphetamine to him). He already had possession of the methamphetamine when defendant brought Smith to his trailer to purchase it. (See *People v. Busch* (2010) 187 Cal.App.4th 150, 161 (*Busch*).) The evidence instead showed that defendant aided in the *sale* of the methamphetamine. In its closing argument regarding count 1, the prosecutor tellingly asserted the following: "So we know that the perpetrator, [Slow Bro] is guilty of *selling* meth with a loaded operable firearm, and we know that he's guilty of that. And so because [defendant] is an aider and abettor in the sell [*sic*] of that methamphetamine, she is also guilty of that crime, just as equally as he is." Because defendant was charged in count 1 with *possession* of methamphetamine while armed with a loaded firearm, not the *sale* of

methamphetamine while armed with a loaded firearm, the evidence did not support the conviction.

Nonetheless, the People contend that defendant aided and abetted Slow Bro in the possession of the methamphetamine (as well as the firearms and ammunition). However, they claim that she did so "by acting as a 'middleman' and *facilitating the sale* of those items." (Italics added.) In support of this claim, they point to defendant's conduct of texting photos of the contraband to Smith, negotiating the sales prices of the items, vetting Smith as an appropriate buyer, driving Smith to Slow Bro's home, waiting outside until the sale was complete, and demanding money for her work as a middleman. Such evidence only shows that defendant aided in the *sale* of the methamphetamine; it does not show she aided in the *possession* of the methamphetamine.

In the alternative, the People argue that defendant was guilty since she had constructive possession of the methamphetamine (as well as the firearms and ammunition). To establish constructive possession, the prosecution must prove a defendant had dominion and control over the prohibited item, either directly or through another person. (*People v. Pena* (1999) 74 Cal.App.4th 1078, 1083-1084.) The People point to essentially the same evidence that it cited in support of the aiding and abetting theory—that defendant "decided who was going to buy the contraband, she negotiated the price of the items, she drove the buyer to the location of the contraband, and she waited outside while Smith bought the illegal items." However, this evidence did not indicate that defendant had dominion or control of the methamphetamine (e.g., that she had authority to set the price or sell the methamphetamine herself). Rather, the evidence

showed that Smith told defendant he was interested in buying firearms and offered to also buy drugs. Defendant brought him to meet Slow Bro, who sold him the methamphetamine, as well as the firearms and ammunition. We note the evidence that after the sale was completed, defendant called Smith to ask for her "cut" for being the middleman and brokering the deal. Thus, the evidence established that defendant simply acted as a middleman in the sale of the methamphetamine.

We conclude the evidence was insufficient to prove that defendant aided and abetted in the possession of methamphetamine while armed with a loaded firearm, as alleged in count 1, or that she had constructive possession of methamphetamine. Therefore, the conviction in count 1 should be reversed.

C. *The Evidence Was Insufficient to Support the Convictions in Counts 3 and 4*

Defendant was convicted of being a felon in possession of a firearm (§ 29800, subd. (a)) in count 3 and being a felon in possession of ammunition (§ 30305, subd. (a)) in count 4. In order to prove defendant guilty of these charges, the People were required to show that defendant possessed a firearm and ammunition, knew that she possessed these items, and had previously been convicted of a felony. The prosecution argued that defendant either constructively possessed the firearms and ammunition or aided and abetted Slow Bro in his possession of them.

On appeal, the People again argue that defendant constructively possessed the firearms and ammunition, or that she aided and abetted Slow Bro in his possession of those items. However, as discussed *ante*, the conduct cited by the People as showing that defendant had constructive possession of the firearms and ammunition only demonstrated

that she worked as a middleman to broker the *sale* of the firearms and ammunition. The evidence did not show that defendant had the right to control the firearms or ammunition. Furthermore, there was no evidence to support a finding that defendant aided and abetted Slow Bro's possession of the firearms and ammunition. He already possessed those items when she brought Smith to his trailer to purchase them. (*Busch*, *supra*, 187 Cal.App.4th at p. 161.) Since the evidence was insufficient to prove that defendant possessed the firearms or ammunition, either constructively or by aiding and abetting Slow Bro's possession of those items, the convictions in counts 3 and 4 should be reversed.[4]

In sum, there was insufficient evidence to show that defendant constructively possessed the methamphetamine, firearms, or ammunition, or that she aided and abetted Slow Bro in his possession of those items. Therefore, the convictions on counts 1, 3, and 4 must be reversed.

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[4] We note defendant's argument that insufficient evidence supported her convictions in counts 3 and 4 under an aiding and abetting theory, since the prosecution failed to show that she knew Slow Bro was a convicted felon. Citing a federal circuit court decision, defendant asserts the Ninth Circuit has held that federal law does not require the government to prove an aider and abettor knew the principal was a felon. (*United States v. Canon* (9th Circ. 1993) 993 F.2d 1439, 1442, superseded on other grounds as stated in *United States v. Barker* (9th Circ. 2017) 689 Fed. Appx. 555, 557.) The People contend that defendant's convictions in counts 3 and 4 were based on *her own status* of being a felon. In light of our conclusion *ante* that there was insufficient evidence to show defendant possessed the firearms or ammunition, we see no need to discuss the element requiring a previous felony conviction.

II. There is No Need to Address the Applicability of Section 654

Defendant contends that if this court affirms her convictions, the punishment on counts 3 and 4 should be stayed pursuant to section 654. In light of our determination *ante*, we need not address this claim. (See *ante*, § I.)

DISPOSITION

The convictions on counts 1, 3, and 4 are reversed. The clerk of the superior court is directed to prepare an amended abstract of judgment and to forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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McKINSTER
Acting P. J.

We concur:

MILLER
J.

RAPHAEL
J.